LEE KOK NAM

v.

PP

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CRIMINAL APPEAL NO: 42-126-92]
28 OCTOBER 1995

EVIDENCE: *Documentary evidence - Photostats - Admission as secondary evidence - Whether conditions precedent for admission satisfied - Evidence Act 1950, s. 65 - Whether photostats admissible as defence failed to object to admissibility - Whether s. 65 of the Evidence Act 1950 had been taken into account by trial court - Whether there was a miscarriage of justice - Whether conviction should be quashed - Whether evidence on photostats could be disregarded*

CRIMINAL PROCEDURE: *Retrial - Power of appellate court to order a retrial - Criminal Procedure Code, s. 316(a) & (b) - Whether a discretionary power exercisable in the interests of justice and if accused is not prejudiced*

CRIMINAL PROCEDURE: *Retrial - Reason for - Whether appellant would be prejudiced - Whether evidence in question was an issue - Whether issue was on inadmissibility of photostats - Whether right and proper course would be to direct a retrial*

The appellant was appealing against his conviction and sentence. However, the appellant raised a preliminary issue on the admissibility of photostats that the trial court admitted as documentary evidence, ie, P3, P4 and P6. He contended that their admissibility as secondary evidence, did not comply with s. 65 of the Evidence Act 1950.

The Deputy Public Prosecutor ('DPP') contended that although there was evidence satisfying the conditions precedent for the admission of P4, there was no evidence satisfying the conditions precedent for the admission of all other photostats admitted during the trial. It was submitted that this was due to the fact that the appellant had not objected to the admission of those photostats in the trial court.

Held:

[1] A photostat, being a copy made from the original by a mechanical process within the meaning of s. 63(b) of the Evidence Act 1950, is undoubtedly secondary evidence, and will be available as evidence

only under the combined provisions of ss. 65 and 63(b) of the same Act. It will not be available if an explanation is not given as to why the original is not produced. The explanation must of course satisfy one of the conditions of s. 65.

[2] In the instant case, the photostats (except for P4), without the evidence satisfying any one of the conditions precedent for its admission, were undoubtedly, inadmissible evidence. Even in spite of the failure by the defence to object to their admission, the photostats should not have been admitted.

[3] As for P4, even if there was evidence satisfying one of the conditions for its admission, the most likely being s. 65(1), it was most unlikely, in view of the wholesale admission of secondary evidence, that the trial court had applied its judicial mind to s. 65.

[3a] The admission of inadmissible evidence was a miscarriage of justice, and the conviction founded to a very large extent on P12, a document tending towards proof of the offence, must be quashed.

[4] Copious evidence was recorded in the trial, and evidence on the photostats and all evidence adduced in relation thereto were all too intricately and finely interwoven with other documentary and oral evidence, together forming the body of the entire prosecution case, as would allow the photostats and all oral testimony adduced in relation thereto to be extricated and then disregarded without the loss of the entire body of evidence.

[5] In a criminal proceeding, the powers of an appellate court to order a retrial is found in s. 316(a) & (b) of the Criminal Procedure Code. It is a discretionary power, exercisable if the ends of justice so require and if the accused will not be prejudiced.

[6] The delay and the long interval between the commission of the alleged offence and retrial would not prejudice the appellant's preparation of his defence as the appellant was the only witness testifying for the defence in the trial court. Most reasonably in the retrial, he would not have to secure witnesses he no longer could secure or locate. Moreover, the exhibits he relied on could easily be re-tendered.

[7] It is trite that courts will not give to the prosecution, by a retrial, a second chance to adduce evidence that was absent. In the instant case, the evidence in question was never absent. All the documents were before the trial court. It was because there was no consideration

of s. 65 and the court's oversight was contributed by the prosecution and defence that those documents must now be discounted. The miscarriage occasioned by the admission of the photostats could not be laid only to the door of the prosecution, as admissibility was a matter entirely in the province of the trial court.

[8] There is no given yardstick to guide an appellate court as to when it should or should not order a retrial. Ultimately, it is largely dependant on an appellate court's perception of what is in the interests of justice, and whether the preponderance of justice is against or is in favour of a retrial. In the instant case, the right and proper course would be to direct a retrial.

[Conviction quashed and retrial ordered.]

Cases referred to:
Awaluddin bin Suratnam & Ors v. PP [1992] 1 MLJ 416 ***(refd)***
Aw Kew Lim & Ors v. PP [1987] 2 MLJ 601 ***(foll)***
Chee Chiew Heng v. PP [1981] 2 MLJ 287 ***(refd)***
Goh Beng Seng v. Doi bin Dollah [1970] 2 MLJ 96 ***(foll)***
Harjit Singh v. Regina [1963] 29 MLJ 287 ***(foll)***
Mahadi v. PP [1970] 1 MLJ 16 ***(refd)***
Mohd Din @ Mohd Nor Awang v. PP [1985] 1 CLJ 356 ***(refd)***
Mui Bank Bhd Johore v. Tee Puat Kuay @ Tee Puat Kway [1993] 4 CLJ 69 ***(foll)***
PP v. Dato Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 ***(refd)***
PP v. Munusamy [1967] 1 MLJ 238 ***(refd)***
PP v. Ooi Seng Huat [1968] 2 MLJ 169 ***(refd)***
PP v. You Kong Lai [1985] 1 MLJ 298 ***(refd)***
Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 ***(refd)***
Sallehuddin bin Yahya v. PP [1979] 2 MLJ 138 ***(refd)***
Sia Geok Hee v. PP [1995] 2 CLJ 841 ***(refd)***
Syarikat Jengka Sdn Bhd v. Abdul Rashid bin Harun [1981] 1 MLJ 201 ***(refd)***
Tan Boon Hock v. PP [1979] 1 MLJ 236 ***(refd)***
Tan Sri Tan Hian Tsin v. PP [1979] 1 MLJ 73 ***(refd)***
Zahari bin Yeop & Anor v. PP [1980] 1 MLJ 160 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 316(a), (b)
Evidence Act 1950, ss. 63, (b), 64, 65, (1)

For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s Karpal Singh & Co
For the respondent - Hassan Abdul Ghani; Public Prosecutor

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:

On 2 May 1992, the Georgetown Sessions Court convicted and sentenced the appellant to three years' imprisonment and fined him RM2,000 on the following charge:

> That you between the 25th day of April, 1984 and the 30th day of April 1984 at the Malaysia Resources Corporation Sdn. Bhd. construction site at Bukit Air Itam Holding No. 1387, Mukim 13, in the District of Georgetown, in the State of Penang, being entrusted with certain property in your capacity as an agent of Staff Engineering Sdn. Bhd. to wit thirteen (13) units Tsurumi Submersible Aerators Model 55 TR committed criminal breach of trust in respect of that property by dishonestly disposing of the said property and that you thereby committed an offence punishable under section 409 of the Penal Code.

This is the appellant's appeal against his conviction and sentence.

As a preliminary issue, preceding full arguments on the substantive merits of the appeal from both sides, Mr Karpal Singh, learned counsel for the appellant, invited this court to make a ruling on the admissibility, or otherwise, of photostats that the trial court admitted as documentary evidence (P3, P4 and P6). He contended that no evidence was led, and there was no evidence satisfying the conditions precedent, for the trial court's admission of those photostats, as permitted secondary evidence, pursuant to the provisionsof s. 65 of the Evidence Act 1950 (Cap 56). He cited the case of *PP v. Dato Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, where the learned judge, Abdoolcader J (as he then was), disregarded certain exhibits put in the course of the trial for identification but were not proved nor properly admitted.

The learned DPP, who did not object to the prior resolution of that preliminary issue, contended however that there was evidence, in pp. 27 and 132 of the appeal record, satisfying the conditions precedent for the admission of P4, although he conceded that there was no evidence satisfying the conditions precedent for the admission of all other photostats admitted during the trial. That, he submitted, was because counsel with the conduct of the defence in the trial had not objected to the admission of those photostats.

On the necessity to object to the admission of inadmissible evidence, Sharma J in *Goh Beng Seng v. Doi bin Dollah* [1970] 2 MLJ 96 at 97 said,

> The mere fact, however, that counsel for the defendant in this case did not object to the admissibility of statements of witnesses made to the police, does not excuse me from excluding such evidence if in fact and law it is not admissible. It is the duty of the court to disallow all inadmissible evidence even though no objection is taken to its admissibility. Inadmissible evidence remains inadmissible. It cannot be rendered admissible by failure of counsel to object to it.

Alauddin J, in *Mui Bank Bhd. Johore v. Tee Puat Kuay @ Tee Puat Kway* [1993] 4 CLJ 69 enunciated the duty of the court, at 72, as follows:

> ...it is really a matter for the court to decide. An erroneous omission to object to inadmissible evidence does not make it admissible. It is the duty of the court to exclude such inadmissible evidence even though no objection is taken to its admissibility, by the parties.

Across the causeway, Winslow J, in *Harjit Singh v. Regina* [1963] 29 MLJ 287, held,

> it is clear that inadmissible evidence cannot be rendered admissible, contrary to the rules of evidence, merely because no objection is taken. It is the duty of the prosecution to prove its case strictly and it is well-known that even admissions of facts like these will not suffice in a criminal trial.

The same clear duty of the court was spoken in *Aw Kew Lim & Ors v. PP* [1987] 2 MLJ 601, where Chan Sek Keong JC (as he then was) held, rejecting the submission that the defence had not objected to the admission of a computer printout – when the conditions for its admission were not fulfilled – that "it is clear law that inadmissible evidence does not become admissible because of failure of counsel to object to its admission.

With regard to the instant photostats admitted in the trial, the following provisions in the Evidence Act 1950 governed its admission in the proceeding:

Section 63. Secondary evidence

Secondary evidence includes

(a) certified copies given under the provisions hereinafter contained;

(b) copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(c) copies made from or compared with the original;

(d) counterparts of documents as against the parties who did not execute them;

(e) oral accounts of the contents of a document given by some person who has himself seen or heard it or perceived it by whatever means.

Illustrations

(a) ... to ... (d)

Section 65. Cases in which secondary evidence relating to documents may be given

(1) Secondary evidence may be given of the existence condition or contents of a document admissible in evidence in the following cases:

(a) when the original is shown or appears to be in the possession or power –

(i) of the person against whom the document is sought to be proved;

(ii) of any person out of reach of or not subject to the process of the court; or

(iii) of any person legally bound to produce it, and when after the notice mentioned in section 66 such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Malaysia to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2)(a) In the cases referred to in subsection (1)(a), (c) and (d) any secondary evidence of the contents of the document is admissible.

(b) In the case referred to in subsection (1)(b) the written admission is admissible.

(c) In the case referred to in subsection (1)(e) or (f) a certified copy of the document but no other kind of secondary evidence is admissible.

(d) In the case referred to in section (1)(g) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents.

Whenever documentary evidence is tendered, the production of the original document itself is required (see s. 64 of the Evidence Act 1950). There are exceptions, and in a criminal proceeding it is found in s. 65; but the burden of proving the circumstances bringing the case within any one exception is upon the party seeking to adduce the secondary evidence [see *Popular Industries Limited v. Eastern Garment Manufacturing Sdn. Bhd.* [1989] 3 MLJ 360, where Edgar Joseph Jr J (as he then was) also held, "inadmissible evidence does not become admissible simply by reason of failure to object"].

A photostat, being a copy made from the original by a mechanical process within the meaning of s. 63(b), is undoubtedly secondary evidence, and would be available as evidence only "under the combined provisions of ss. 65 and 63(b) of the Evidence Act 1950" [see *Tan Sri Tan Hian Tsin v. PP* [1979] 1 MLJ 73 at 76], and would not be if an explanation is not given why the original is not produced [see *Syarikat Jengka Sdn. Bhd. v. Abdul Rashid bin Harun* [1981] 1 MLJ 201]. The explanation must of course satisfy one of the conditions of s. 65.

In the instant case, the photostats – save for P4 that the learned DPP contended had the evidence satisfying the conditions precedent for admission – without the evidence satisfying any one of the conditions

precedent for its admission were undoubtedly inadmissible evidence, and even in spite of the failure of counsel to object should not have been admitted as P3, P6, P12, P13, P38, P56 and P58. As for P4, even if there was evidence satisfying one of the conditions for its admission, the most likely being s. 65(1), it was most unlikely, in view of the wholesale admission of secondary evidence, that the trial court had applied its judicial mind to s. 65. The admission of inadmissible evidence was a miscarriage of justice, and the conviction founded to a very large extent on P12, a document purportedly of the appellant and tending towards proof that the appellant removed the aerators, must be quashed.

The only question remaining, in the opinion of this court, is whether there should be a retrial. Copious evidence was recorded in the trial, and evidence on the photostats and all evidence adduced in relation thereto were all too intricately and finely interwoven with other documentary and oral evidence, together forming the body of the entire prosecution case, as would allow the photostats and all oral testimony adduced in relation thereto to be extricated and then disregarded without the loss of the entire body of evidence, unlike *PP v. Dato Haji Harun bin Haji Idris & Ors (supra)* (where Abdoolcader J disregarded all reference to D41 and D43 – the audited accounts and annual reports of the bank – that were not proved and properly admitted, and all oral testimony adduced in relation thereto) where there were only two exhibits to be solated. As it turned out, both sides accepted the court's invitation to submit on a retrial without demurrer.

In a criminal proceeding, the powers of an appellate court to order a retrial is found in s. 316(a) & (b) of the Criminal Procedure Code (Cap 6). It is a discretionary power [see *Tan Boon Hock v. PP* [1979] 1 MLJ 236] exercisable if the ends of justice so require [*Zahari bin Yeop & Anor v. PP* [1980] 1 MLJ 160] and if it will not prejudice the accused [*Sallehuddin bin Yahya v. PP* [1979] 2 MLJ 138].

Accordingly, a retrial was not ordered in *Awaluddin bin Suratnam & Ors v. PP* [1992] 1 MLJ 416, as the appellant was imprisoned since his conviction and a retrial would not be fair and proper [see also *Sia Geok Hee v. PP* [1995] 2 CLJ 841 where a retrial was not ordered by reason of the period of detention and that the appellants were first offenders], and in *Mohd. Din @ Mohd Nor Awang v. PP* [1985] 1 CLJ 356, as four years had lapsed since the commission of the offence.

However, an improper charge [*Tan Boon Hock (supra)*], a charge that contravened an express statutory provision [*PP v. Ooi Seng Huat* [1968] 2 MLJ 169], the unsatisfactory manner in which the appeal records were kept [*PP v. You Kong Lai* [1985] 1 MLJ 298], a failure to take into account

properly admitted evidence [*PP v. Munusamy* [1967] 1 MLJ 238], were all held as a sufficient reason for a retrial.

Arguing against a retrial, Mr Karpal Singh commented on the slow pace of the trial, and he contended, citing *Chee Chiew Heng v. PP* [1981] 2 MLJ 287, that a retrial would give the prosecution "a second bite of the apple". The learned DPP contended however that in the interests of justice, a retrial should be ordered. The slow pace of the trial, he said, was not entirely due to the prosecution, as the defence sought and was granted a number of adjournments. Moreover, it was not that the prosecution did not have the evidence to substantiate the charge; it was the manner in which it was produced that the prosecution was found wanting.

On the alleged slow pace of the trial, the transcript is a fair record of the progress of the trial. On 10 February 1988 and 22 August 1988, the prosecution applied for adjournments as subpoenas were not served on some of the witnesses. On 17 April 1989 the court adjourned the case on its own motion. Trial commenced on 7 August 1989 and continued on 8 August 1989. Continued trial was then adjourned to 4 September 1989, 7 September 1989 and 8 September 1989. On 4 September 1989, defence counsel was absent and the case was set down for mention on 4 October 1989. On 4 October 1989, defence counsel was absent and the case was set down for mention on 25 October 89. Continued trial resumed on 19 December 1989. On 18 January 1990, continued trial was adjourned as the defence applied for SP2 to be recalled. Continued trial resumed on 9 February 1990. On 10 February 1990, defence counsel was absent. The trial judge was then transferred to Ipoh, and trial was set down to be resumed on 15 June 1990 and 16 June 1990. On 16 June 1990, the prosecution applied for an adjournment. On 27 July 1990, 20 November 1991 and 7 January 1991, the court adjourned the trial as the trial judge was not in Georgetown. On 1 March 1991, defence counsel was not well. On 5 April 1991 defence counsel applied for an adjournment. Trial resumed on 3 May 1991. On 17 May 1991, trial was postponed as trial judge was not available. On 28 June 1991, trial resumed. Both parties concluded their submissions at the close of the prosecution case on 29 June 1991. The court's decision on a case to be answered was fixed for 29 July 1991. On 29 July 1991, defence counsel was absent and the court adjourned its decision to 2 September 1991. On 13 January 1992, the court called for the defence. The defence case commenced on 13 January 1992. On 23 January 1992, the prosecuting officer was on leave. On 28 February 1992, defence counsel was not well. Defence case resumed on 23 April 1992. The entire trial concluded on 24 April 1992. The court convicted and sentenced the accused on 2 May 1992.

That it took more than four years, from the day it was first set down for trial, for the trial to be concluded is nothing to shout about. Yet, neither the prosecution nor defence could pin total blame on the other, as the pace of the trial, and it was slow, was equally contributed by the prosecution and defence, by the transfer of the trial judge as well by the long dates given for many adjournments. The supply of the trial court's written judgment and the appeal record in June 1995 is the reason for this appeal being heard in 1995.

Nevertheless, that delay and the long interval between the commission of the alleged offence and retrial would not prejudice the appellant's preparation of his defence, as the appellant was the only witness testifying for the defence in the trial below, and most reasonably in the retrial, he would not have to secure witnesses he no longer could secure or locate. Moreover, the exhibits he relied for his defence could be easily re-tendered.

It is trite that courts will not give to the prosecution, by a retrial, a second chance to adduce evidence that was absent. In the instant case, the evidence in question was never absent all the documents were before the trial court. It is only because there was no consideration of s. 65, and the court's oversight was contributed by the prosecution and defence, that those documents and its contents must now be discounted.

It is now opportune to quote Chang Min Tat J, (as he then was) in *Mahadi v. PP* [1970] 1 MLJ 16, at 17:

> With respect, I find myself in full accord with what Spenser-Wilkinson J said. The prosecution ought not be allowed, in a colloquial phrase, 'two bites of the apple'. But where the prosecution has adduced all the evidence it has and the evidence has established a *prima facie* case against the accused against which unrebutted would warrant his conviction, then the failure of justice occasioned by the trial president in placing the wrong burden of proof on the accused cannot be laid to the door of the prosecution. A retrial would not be giving the prosecution a second chance to prove its case. It would merely, under such circumstances, be to uphold the rule of law. I recall a dictum of the Indian Court in the case of *Abdul Rahim v. King-Emperor* that it is as much a miscarriage of justice to acquit a guilty man as to convict an innocent man.

Equally, in the instant case, where the prosecution had adduced all available evidence that was material, the miscarriage occasioned by the admission of photostats could not be laid only to the door of the prosecution, as admissibility was a matter entirely in the province of the trial court.

There is no given yardstick to guide an appellate court as to when it should or should not order a retrial. Ultimately, it is largely dependent on an appellate court's perception of what is the interests of justice of the case before it, and whether the preponderance of justice is against or is in favour of a retrial. In the present case, and for the reasons given hereinbefore, it is the opinion of this court that the right and proper course will be to direct a retrial.

Accordingly, allowing the appeal, the conviction is quashed and a retrial is ordered.